

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2040-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALLACE VINCENT McCLAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Reversed and cause remanded with directions.*

CURLEY, J. Wallace Vincent McClain appeals from a judgment of conviction entered after he pleaded guilty to carrying a concealed weapon, contrary to § 941.23, STATS. After McClain's vehicle was stopped for committing a lane deviation violation, police officers searched the car, forcibly opened a locked console to which McClain said he had no key, and found a loaded pistol.

McClain argues that the trial court erred by denying his motion to suppress the weapon because: (1) the officers did not have a reasonable suspicion to pull over his automobile because of the alleged lane deviation violation; and (2) the search of the locked console box was unconstitutional. This court concludes that the officers had the authority to stop McClain's vehicle, and to generally search the passenger compartment. This court also concludes, however, that the officers only had the authority to search the locked console if McClain could have gained "immediate control" over the pistol. Although the trial court concluded that McClain could have "gained access" to the console, the trial court failed to make a factual finding as to whether McClain could have gained "immediate control" over the pistol inside the locked console. Therefore, we reverse and remand the judgment to the trial court to make factual findings on this issue, consistent with this opinion. If the trial court finds that McClain could not have gained "immediate control" over the pistol, it should grant McClain's motion to suppress. Alternatively, if the trial court finds that McClain could have gained "immediate control" over the pistol, it should reinstate the judgment of conviction.

I. BACKGROUND.

On July 23, 1996, Officer Michael Grogan was conducting surveillance of a gun store located on the north side of the City of Milwaukee, as part of an investigation into "straw purchases" of weapons. A "straw purchase" is the purchase of a weapon by a non-felon for a convicted felon. Officer Grogan became suspicious of three males walking out of the gun store when one of them placed a long object into the trunk of their yellow vehicle, which Officer Grogan believed to be a weapon. Officer Grogan then radioed an unmarked police car occupied by Officers Christopher Guiliani and Jeffrey Wirsch, and told the officers to follow the yellow vehicle. Officers Guiliani and Wirsch began to

follow the vehicle, which McClain was driving, and pulled it over after McClain committed a lane deviation violation.

After stopping McClain's car, Officers Guiliani and Wirsch approached the vehicle on foot. As they were approaching, Officer Guiliani noticed a number of bullets on the floor of the car. After seeing the bullets, the officers ordered McClain and his two passengers out of the car, removed them to the side of the road, and conducted patdown searches of all three individuals.

Following the patdown searches, Officer Guiliani searched the passenger compartment of McClain's car. Officer Guiliani checked underneath the passenger seat and found a "banana" clip containing bullets similar to the ones on the floor of the car. Officer Guiliani then proceeded to inspect the center console compartment located between the driver's and passenger's seats. Officer Guiliani attempted to open the console, but could not because it was locked. Officer Guiliani then asked McClain if he had a key for the console, and McClain responded that he did not have a key.

Officer Guiliani testified at the hearing on the motion to suppress that after McClain denied having a key:

I went to the back [of the console]. You could pull it up far enough. I looked in there. I saw a chrome semiautomatic pistol in there with a clip in it, and I alerted Detective Delgado there was a gun inside the console, loaded weapon, or that I believed it was loaded because the clip was in it, and at that time ... I pulled it [the console] up and Detective Delgado reached in and recovered the weapon.

McClain was then arrested and charged with carrying a concealed weapon after he made a statement to the officers that the pistol found in the center console belonged to him.

McClain filed a motion to suppress the pistol, which was denied following a hearing. McClain subsequently pleaded guilty, was sentenced, and now appeals.

II. ANALYSIS.

A. The stop of McClain's vehicle.

McClain first argues that the trial court erred by finding that the officers had a reasonable suspicion to stop his vehicle for a lane deviation violation. We disagree.

In *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769 (1996), the Supreme Court noted that:

Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a “seizure” of “persons” within the meaning of [the Fourth Amendment of the United States Constitution]. An automobile stop is thus subject to the constitutional imperative that it not be “unreasonable” under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

Id. at ___, 116 S. Ct. at 1772.

In the instant case, the trial court found that the police officers had probable cause to believe that a traffic violation had occurred. Although disputed by McClain, the trial court specifically found that McClain was driving erratically before he was stopped, and that he deviated lanes improperly. The court based these findings on the testimony of Officer Wirsch, which the court found to be

“clear, precise and persuasive,” and the testimony of Officer Guiliani, which, in the court’s view, was “generally the same as, and [did] not undermine, Officer Wirsch’s testimony.” The trial court also found that neither McClain’s testimony, nor that of Mr. Edwards, a passenger in the car, was credible. The court specifically noted that both McClain’s and Edwards’s “pointed testimony that the police used a public address system to force them over puts the lie to the rest of their testimony in view of the undisputed fact that unmarked police vehicles are not so equipped.” This court must accept a trial court’s factual findings unless they are clearly erroneous, and must give due regard to the trial court’s opportunity to judge the credibility of witnesses. See *State v. Yang*, 201 Wis.2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996); § 805.17(2), STATS. Thus, we conclude that the trial court properly found that the officers had probable cause to stop McClain’s vehicle. McClain, however, also argues that the stop in this case was improper, because the lane deviation violation was not the actual reason why the officers stopped his vehicle, but merely a convenient pretext. McClain admits that, in *Whren*, the Supreme Court put to rest such arguments when it held that: “[T]he temporary detention of a motorist upon probable cause to believe that he violated the traffic laws does not violate the Fourth Amendment’s prohibition against unreasonable seizures even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective.” *Whren*, 517 U.S. at ___, 116 S. Ct at 1771. Nonetheless, McClain asks this court to disregard *Whren* and fashion a different rule for Wisconsin. We see no reason to do so, and,

in any event, such action would be incompatible with this court's primary function as an error-correcting court. *See Cook v. Cook*, 208 Wis.2d 166, 188, 560 N.W.2d 246, 255 (1997) (error correction is primary function of court of appeals). Therefore, we conclude that, under *Whren*, the officers' subjective motivations in this case were irrelevant, and that the stop was proper.

B. The search of the center console.

McClain also challenges the search of the locked center console inside the passenger compartment of his vehicle where the loaded pistol was found. We conclude that the officers only had the authority to search the center console if McClain could have gained "immediate control" over the pistol contained in the locked console.

The validity of an investigatory stop and temporary detention is governed by *Terry v. Ohio*, 392 U.S. 1 (1968), and is codified in § 968.24, STATS. *See State v. King*, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993). *Terry* requires that an officer must reasonably suspect "in light of his or her experience" that some criminal activity has taken place or is taking place before stopping an individual. *See King*, 175 Wis.2d at 150, 499 N.W.2d at 191. A determination of whether a temporary detention is reasonable is based on the totality of the circumstances. *See id.* If an officer has a suspicion, grounded in specific, articulable facts and reasonable inferences drawn from those facts, the officer may conduct a temporary detention of the individual in order to investigate further. *See id.* Moreover, the officer may frisk the person for weapons if the officer is justified in believing that the person he or she confronts may be armed. *See Terry*, 392 U.S. at 24-27; *see also* § 968.25, STATS. ("When a law

enforcement officer has stopped a person for temporary questioning pursuant to s. 968.24 and reasonably suspects that he or she or another is in danger of physical injury, the law enforcement officer may search such person for weapons or any instrument or article or substance readily capable of causing physical injury”).

Both the United States Supreme Court and the Wisconsin Supreme Court have expanded the scope of a search for weapons during a *Terry* vehicle stop to include a search of the passenger compartment of the vehicle. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court held that:

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant” the officers in believing that the suspect may gain immediate control of weapons.

Id. at 1049 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). In *State v. Moretto*, 144 Wis.2d 171, 423 N.W.2d 841 (1988), the Wisconsin Supreme Court held that the result reached in *Long* would be the same under state constitutional law. *See id.* at 182, 423 N.W.2d at 845. The supreme court held that:

[T]he scope of a search for weapons under sec. 968.25, Stats. is not limited to the search of a person but may, in accordance with *Long*, encompass the search of the passenger compartment of the person’s vehicle where the officer “reasonably suspects that he or another is in danger of physical injury.”

Id. at 177-78, 423 N.W.2d at 843.

In this case, Officer Guiliani testified that, as he approached McClain’s car, he saw numerous bullets on the floor of the vehicle. Officer

Guiliani testified that, after seeing more than five to ten bullets, he suspected that there was also a gun in the car, and felt concern for his safety. Based on Officer Giuliani's suspicions, McClain and his two passengers were ordered out of the car, and the passenger compartment of the vehicle was searched. Under both **Long** and **Moretto**, the officers' actions up to this point were clearly proper. After seeing more than five to ten bullets on the floor of McClain's vehicle, Officer Giuliani could reasonably infer that a gun was likely nearby, and could "reasonably suspect that he or another was in danger of physical injury." Thus, the search of the passenger compartment of McClain's vehicle, in general, was permissible.

The search of the locked console box, however, is another matter. The search of a passenger compartment of a vehicle during a **Terry** stop is limited in scope to areas over which a defendant has immediate control. *See Long*, 463 U.S. at 1049 (search of a passenger compartment of a vehicle during a **Terry** stop limited to situations in which an officer "possesses a reasonable belief ... that ... the suspect may gain *immediate control* of weapons." **Long**, 463 U.S. at 1049 (emphasis added); *see also id.* at 1050 ("The subsequent search of the car was restricted to those areas to which Long would generally have *immediate control*") (emphasis added); *see also id.* at 1051 ("In this case, the officers did not act unreasonably in taking preventative measures to ensure that there were no other weapons *within Long's immediate grasp* before permitting him to reenter his automobile.") (emphasis added); *also see Moretto*, 144 Wis.2d at 183, 423 N.W.2d at 846 (Wisconsin Supreme Court, in applying **Long**, explicitly cites **Long's** holding that a search is only permissible if an officer reasonably believes that "the suspect may gain *immediate control* of weapons") (emphasis added).

The District of Columbia Court of Appeals, in **Turner v. United States**, 623 A.2d 1170 (D.C. Ct. App. 1993), applied the principle that a search

pursuant to *Long* is limited to those areas of a vehicle over which a defendant has immediate control. In *Turner*, police officers, pursuant to a vehicular *Terry* stop, searched the passenger compartment of the defendant's hatchback. *Id.* at 1172. While doing so, an officer reached into the back of the "hatchback" portion of the passenger compartment, removed a rear quarter panel which concealed a spare tire, and discovered a loaded gun. *Id.* The court noted that, in *Long*, the search of the vehicle was "restricted to those areas to which Long would generally have immediate control, and that could contain a weapon." *Id.* at 1174 (citing *Long*, 463 U.S. at 1050). Then, following a lengthy discussion, the court concluded that: "The issue boils down to whether there was evidence rationally permitting the trial judge to find that the gun in appellant's car was concealed where he could gain *immediate control* of it." *Id.* at 1176 (emphasis added). The court then concluded that it was not unreasonable for the judge to have inferred that an occupant of the car could gain immediate control of the gun by pulling down the panel cover, as the officer had, and therefore, that the search did not violate the Fourth Amendment. *See id.*

In contrast, without more factual findings, it is impossible for this court to determine whether McClain, or one of his passengers, could have gained immediate control over the pistol contained in the locked center console. The facts of this case, based on the record on appeal, are very unusual. The center console where the loaded pistol was found was apparently similar to a glove box, and was located between the driver's and passenger's seats. Officer Guiliani testified that, during the search of the vehicle, he tried to open the console, but could not do so, because it was locked. Officer Guiliani testified that he then asked McClain for the key, and that McClain said that he did not have the key. Officer Guiliani then testified that:

I went to the back [of the console]. You could pull it up far enough. I looked in there. I saw a chrome semiautomatic pistol in there with a clip in it, and I alerted Detective Delgado there was a gun inside the console, loaded weapon, or that I believed it was loaded because the clip was in it, and at that time ... I pulled it [the console] up and Detective Delgado reached in and recovered the weapon.

Thus, in this case, two police officers, acting together, apparently had to forcibly pry open the locked console box, to which the defendant claimed he had no key, in order to remove the pistol.

Although no Wisconsin court has dealt with the issue, other courts have upheld searches of locked glove compartments, when the defendant possessed a key, and the officer used the key to open the glove compartment, because in such cases, the interior of the glove compartment was under the defendant's immediate control. *See United States v. Holifield*, 956 F.2d 665, 668-69 (7th Cir. 1992) (court upholds officer's search of locked glove compartment with keys from ignition which yielded a loaded pistol, and finds that "once the occupants reentered the vehicle, it would have taken only a few seconds for [the defendant] or one of the passengers to remove the keys from the ignition and unlock the glove compartment, thus giving them immediate access to the pistol."); *see also United States v. Brown*, 913 F.2d 570, 571-72 (8th Cir. 1990) (court notes, in finding that officers acted properly by opening a locked glove compartment with a key lying on the front seat, that defendants had "immediate access to the area of the glove compartment.") In this case, however, McClain stated that he did not have a key, and the officers, rather than opening the locked compartment with a key, apparently forced the compartment open. Additionally, it appears to have taken the cooperation of two police officers to remove the pistol from the locked console. Thus, this court cannot conclude, without more

information, whether the pistol within the locked console was within McClain's immediate control.

The trial court in this case did make the following factual finding:

If Mr. McClain would have broken free from the officers' control, it is not implausible that he could have gained access to the center console and used the loaded weapon that was located there.

A finding that McClain "could have gained access" to the weapon is not the same as a finding that the weapon was in an area under McClain's "immediate control." The trial court's findings in this case fail to answer the critical question of not only whether McClain could have gained control over the weapon, but whether he could have gained such control "immediately." Therefore, we reverse and remand the judgment to the trial court to make factual findings regarding whether the pistol contained in the locked center console was under McClain's immediate control, in a manner consistent with this opinion. If the trial court finds that McClain could not have gained "immediate control" over the pistol, it should grant McClain's motion to suppress. Alternatively, if the trial court finds that McClain could have gained "immediate control" over the pistol, it should reinstate the judgment of conviction.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

